

REMARKS

For the reasons discussed below, Applicants have amended Claim 6 to limit the claimed subject matter to embodiments in which component (b) is a neonicotinyl and have amended Claim 7 to refer only to compounds of this group.

Restriction Requirement under 35 U.S.C. 121

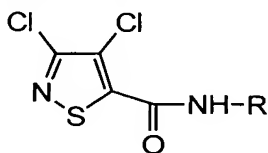
The Office Action requires restriction to one of several patentably distinct species represented by compositions containing component (a) and one of the compounds of component (b) for the purpose of initial examination.

Applicants confirm their telephonic election of the species represented by the compound of formula (I) and imidacloprid (which is represented by formula (II-a)). [Applicants note that the Office Action appears to have considered neonicotinyls more generally than this single species.] This election is without traverse to the extent that it is understood that (a) the restriction requirement will be withdrawn upon the finding of an allowable genus and (b) any species withdrawn from consideration will be transferred to the elected subject matter unless it is found patentably distinct from the elected or allowed claims. Applicants also confirm their right to file one or more divisional applications to the non-elected subject matter.

Rejection under 35 U.S.C. 103

Claims 6-9 stand rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent 6,277,791 ("Assmann et al"). Applicants respectfully traverse.

Assmann et al isothiazolascarboxamides having the general formula



in which R can be a variety of substituted phenyl moieties (including phenyl substituted in the ortho position with cyano, phenyl, or cycloalkyl), benzyl, phenethyl, or substituted alkyl groups. E.g., column 1, lines 19, through column 3, line 22.

Among these many compounds can be found the compound of Applicants' formula (I). E.g., preparative Example 1 at column 17 of Assmann et al, as well as data in Table A at columns 25/26. Assmann et al also teaches that the disclosed compounds can be used in combination with a very large number of other active ingredients (e.g., column 13, line 25, through column 16, line 59), among which can be found imidacloprid and nitenpyram (see column 16, lines 37 and 44). The
CS-8727

reference however does not include even one specific example of such combinations, much less experimental data showing the effectiveness of such combinations.

Applicants, in contrast, have provided experimental data showing the particular effectiveness of a combination of their compound (I) and imidacloprid. See Table 1 of Example 1 at page 24. The Office Action, however, states that the reported efficacy of 26% is too small to constitute a convincing showing. Applicants respectfully submit that this assertion misses an important point. In determining whether the test result is unexpected, one should not simply look at the magnitude of the efficacy result out of context but should instead look at the difference between the expected and observed results. At the application rate used in Applicants' Example 1, the individual components are totally inactive (i.e., each has an efficacy of 0%), with the expected efficacy of the combination also being 0%. Thus, the observed efficacy of 26% for the combination of ingredients is very surprising indeed and certainly would not have been expected in view of the complete lack of activity for the individual components. Applicants therefore submit that their test data are fully consistent with the patentability of the claimed combination of Applicants' compound (I) and imidacloprid. In view of the relatedness of the neonicotinyls of their claims – one of which is, of course, imidacloprid – Applicants submit that it is reasonable to expect all of the combinations encompassed within their amended claims to exhibit similarly enhanced activities.

Applicants therefore respectfully submit that their claims as amended are not rendered obvious by Assmann et al.

In view of the preceding amendments and remarks, allowance of the claims is respectfully requested.

Respectfully submitted,

By Richard E. L. Henderson
Richard E. L. Henderson
Attorney for Applicant(s)
Reg. No. 31,619

Bayer CropScience LP
100 Bayer Road
Pittsburgh, Pennsylvania 15205-9741
PHONE: (412) 777-3809
FACSIMILE PHONE NUMBER:
412-777-3902
s/rmc/reh/0782